



Australian Government

Department of Communications and the Arts

Dr Kilian Perrem
Committee Secretary
House of Representatives Standing Committee on Indigenous Affairs
PO Box 6021
Parliament House
Canberra ACT 2600

15 October 2018

Dear Dr Perrem

**Supplementary Submission - House of Representatives Standing Committee on
Indigenous Affairs' Inquiry into the growing presence of inauthentic Aboriginal
and Torres Strait Islander 'style' art and craft products and merchandise
for sale across Australia.**

As requested by the Committee at the 13 September 2018 roundtable appearance by the Department of Communications and the Arts (DoCA), the Department of the Prime Minister and Cabinet (PM&C), The Treasury, the Australian Competition and Consumer Commission (ACCC) and IP Australia, attached is a joint supplementary submission which I am providing on behalf of all participating agencies.

Yours sincerely

Richard Eccles
Deputy Secretary
Content, Arts, Strategy and Research
Department of Communications and the Arts

**House of Representatives Standing Committee on Indigenous Affairs
Inquiry into the growing presence of Aboriginal and Torres Strait Islander 'style' art
and craft merchandise for sale across Australia**

Supplementary Submission

Department of Communications and the Arts, Department of the Prime Minister and Cabinet,
The Treasury, the Australian Competition and Consumer Commission, IP Australia

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Introduction

On 13 September 2018, the House of Representatives Standing Committee on Indigenous Affairs requested that further information be provided collectively by the Department of Communications and the Arts (DoCA), the Department of the Prime Minister and Cabinet (PM&C), The Treasury, the Australian Competition and Consumer Commission (ACCC) and IP Australia, following the roundtable appearance of these agencies at the Inquiry.

Defining Indigeneity

As per the definition used by the Australian Government, an Aboriginal or Torres Strait Islander person is someone of:

- Aboriginal and / or Torres Strait Islander descent,
- who identifies as an Aboriginal or Torres Strait Islander and,
- who is accepted as such by the community in which they live, or previously lived.

In respect of this definition, under the Australian Consumer Law (ACL)/Competition and Consumer Act (CCA), credence claims (i.e. claims about the origin / creation process / prior history of a good that is not readily apparent for a casual inspection of the good) are typically considered by reference to what a 'reasonable consumer' understands or expects the credence claim to mean. The definition of Indigeneity set out above seems likely to accord with the general community understanding of that term.

Consumers – guidance and protection

Voluntary digital labelling for authentic Indigenous Products – DoCA

On 13 June 2018, the Minister for Communications and the Arts announced \$150,000 for a 2018-19 trial with up to three art centres to test digital labels. The trial is being conducted by Desart, the peak body for central Australian Aboriginal art centres.

Digital labels on authentic products aim to assist consumers to make informed choices, and increase economic and cultural opportunities for Aboriginal and Torres Strait Islander artists and designers. The labels will provide a portal for consumers to obtain provenance and artist information, and can also be used by producers and wholesalers to promote and track the product, and promote their organisations.

The digital labelling trial proposes to use Stories Art Money (SAM) as its platform. SAM is the national, web-based arts sales and cataloguing system used by around 90 Indigenous art centres, most in very-remote communities. SAM was commissioned by Desart with funding through the Australian Government's IVAIS program.

SAM is a fully integrated system that holds information and images of catalogued art works, artist's biographies, and authenticity certificates, and can be linked to the art centre's website for e-sales. It provides stock management control and communicates with the organisation's finance function through MYOB or QuickBooks.

Digital labelling technologies are a low cost form of self-regulation, and build on the investment into existing labelling methods. The benefits of this technology for retailers and suppliers is likely to encourage take-up. Following the trial, stage two could involve extending the system to any Indigenous art centres that use SAM.

Education for consumers –ACCC and DoCA, with Tourism Australia

Once the outcomes of the Birubi proceedings are known, the ACCC, in consultation with the Department of Communications and the Arts, will provide enhanced consumer guidance on the application of the consumer law. This includes guidance for inbound passengers to Australia for distribution through Tourism Australia channels.

The ACCC's focus would be on the Australian Consumer Law rights consumers have and obligations on traders and information to support informed choice. The ACCC's contribution would involve provision of content and use of consumer and state and territory fair trading networks.

Longer term policy option - Information Standard – Treasury and ACCC with DoCA

The voluntary digital labelling initiative to improve the ability of suppliers, retailers and consumers to see information on the provenance of authentic Indigenous products may require some time to take effect.

A longer term option that could be considered to improve the clarity of labelling is the development of a mandatory information standard. Information standards can be made by the Commonwealth Minister under the ACL with the agreement of state and territory consumer affairs ministers.

A prerequisite in developing an information standard is comprehensively defining the kinds of goods to which the standard will apply. An information standard may then:

- require that specific information is provided to consumers when supplying goods;
- the manner and form of that information; and
- assign a meaning to specified information about goods.

Information Standards are enforced by the ACCC and support compliance activities (including a clearer basis for penalties when the requirements of the standard are contravened) and they inform consumer choice.

For example, an information standard was created in 2017 on free range egg labelling, in response to evidence of misleading labelling and producer uncertainty regarding their labelling obligations.

The steps taken in relation to the free range eggs information standard included:

- Widespread community consultation on what is considered to be “free range” for chicken eggs on the basis that chicken eggs would not be able to be labelled as free range unless they met that definition. Further, consultation was also undertaken on what information should be provided to consumers to assist them in making an informed purchasing decision. This resulted in the making of a national information standard that imposed the requirement to prominently display the actual outdoor stocking density of hens per hectare for eggs labelled as free range.
- COAG regulatory impact analysis, which broadly requires a regulatory option to have a demonstrated clear net benefit to the community.

Defining what information is conveyed about authenticity

While the industry is likely to want some certainty as to what constitutes authentic Aboriginal and Torres Strait Islander products, it is difficult to define authenticity in absolute terms and is dependent on the individual circumstances of the product and its production. However, key factors are likely to include the level of Indigenous Australian involvement into an item's design and production (which is likely to require more than bare consent or limited input) and the originality of the art, craft or design.

Therefore, it is likely that an information standard for Indigenous products claiming to be authentic would require consultation by DoCA with stakeholders, in particular Indigenous Australians, on what is an authentic product and what information should be conveyed when such goods are offered for sale in order to allow consumers to make an informed purchasing decision.

Undertaking this work and the ongoing administration and enforcement of any subsequent information standard would give rise to additional budget requirements for both the Department of Communications and the Arts (with responsibility for determining what is authentic) and the Treasury portfolio including the ACCC (with responsibility for the ACL information standard framework and any subsequent compliance and enforcement).

Suppliers and Retailers – guidance and compliance

Education for the industry – ACCC

The ACL makes it illegal for a supplier or retailer to mislead a consumer as to the authenticity of a product. Under the ACL from 1 September 2018, traders who make misleading representations about the authenticity of goods, or breach an information standard, face maximum penalties that are the greater of \$10 million, three times the value of the benefit from the conduct, or 10 per cent of the annual turnover of the entity in the preceding 12 months (this is a nearly ten-fold increase on previous penalties).

In March 2018, the ACCC commenced legal proceedings against souvenir company Birubi Art Pty Ltd for allegedly making false or misleading representations about Indigenous 'style' products. A key element of the ACCC's case is establishing that the business made implied representations of authenticity by the combination of words and images used.

The ACCC intends that upon any judgment from the Federal Court in *ACCC v Birubi*, it will undertake communications bringing general awareness, setting expectations and providing greater clarity to industry on their obligations under the Australian Consumer Law, particularly when souvenirs are sold without an express statement of authenticity. This would include guidance on what suppliers need to do to avoid making false or misleading representations, either expressly or impliedly, in relation to Indigenous products.

Express representations may include a label or a statement by the supplier stating that it is an authentic Indigenous product. Implied representations may arise, for example, when the product is painted in a traditional Indigenous style, and contains some form of representation as to 'hand painted' or 'hand crafted' or reference to Indigenous Australia.

The ACCC proposes to work with State and Territory ACL regulators to conduct compliance activities to lift awareness following any outcome in the Birubi case.

The ACCC considers the outcome from this case would provide greater leverage for compliance messaging, leading to more effective communication. However, the ACCC is open to bringing forward the timing of preparing and issuing this guidance for industry, should it be asked to.

Authentic producers – guidance, support and supply

Strengthening the voluntary Indigenous Art Code – DoCA

The Code is a national organisation with a core remit of guiding ethical dealing between art dealers and Aboriginal and Torres Strait Islander artists. This remit has recently expanded significantly to include action in response to inauthentic products, including souvenirs.

While the Code is making a significant impact on these two issues within its current Australian Government funding of \$200,000 per annum, its capacity to be pro-active is limited within its current resources.

The Minister for Communications and the Arts sought additional matched support for the Code from state and territory Governments. At the September Meeting of Cultural Ministers, all Ministers endorsed additional support for the Code to assist it to better promote ethical art dealing and take action in response to inauthentic products. Ministers also acknowledged the value of authentic Aboriginal and Torres Strait Islander products, and the cultural and economic harm being caused by inauthentic products.

An increase in funding to the Code will enable it to more effectively meet current demand, and be more proactive in its program delivery, so that problems can be mitigated before they occur. The five key areas in which its program will expand are: increasing numbers and monitoring of Code signatories; more sustained education for artists, wholesalers and retailers; identifying best-practice industry standards in the licensing space; promoting best practice; and engaging pro-actively with state and territory governments on issues particular to their jurisdictions.

The increased funding arrangement has been agreed in accordance with the current role and responsibilities of the voluntary Code. Should a bigger remit be proposed for the Code, its resourcing and governance structure would need to be reassessed. It is also important that any other initiatives that are introduced to address the problem complement the work of the Code.

Indigenous Visual Arts Industry Support (IVAIS) Program – DoCA

The Australian Government's IVAIS program invests approximately \$20 million each year to support the operations of around 80 Indigenous-owned art centres, mostly in remote communities, as well as a number of art fairs, regional hubs and industry service organisations. Together these organisations provide professional opportunities for approximately 7,000 Indigenous artists and more than 300 Indigenous arts workers to engage in the art market, generate income and participate in the nation's economy.

Indigenous art centres have been set up and are funded to produce, exhibit and sell fine art. The industry service organisations are funded to provide tailored services to assist art centres to succeed in the fine art market. This is where the expertise lies, and is the basis from which many artists and art centres have flourished.

A 2017 survey found that 43 IVAIS funded art centres also have commercial products made for the lower end of the market. Of these, 17 art centres reported having two to three products, 10 reported have four to five products, and nine have six or more products.

Bringing a commercial product to market requires a different knowledge and skill set to that needed for successful fine art production, exhibition and marketing. The former includes product research and development, costing, licensing, marketing, distribution and tracking.

Each year, the IVAIS program is fully committed to supporting the fine art side of business, including the employment of Indigenous arts workers. While within current IVAIS funding, there may be limited capacity to support small-scale initiatives in the product development space, this would be unsustainable and would not address the need for ongoing product development and marketing support.

Support Indigenous artists, businesses and suppliers to engage in the market – PM&C

Most of the 43 IVAIS funded art centres that have products expressed an interest in expanding this aspect of their business. Common reasons cited for not expanding included not having the resources to develop new products, and lack of expertise regarding licensing, production and distribution processes. For example, only three of the art centres with products work with wholesalers, while 40 per cent distribute the products themselves.

The Government launched the Indigenous Business Sector Strategy (IBSS) on 12 February 2018. The IBSS focuses on providing: better access to business support; improved access to finance; stronger connections and relationships; and more timely and targeted information. It is a ten-year plan to increase the number, strength and capability of Indigenous businesses across Australia. Indigenous artists and art centres seeking to increase their production and/or take advantage of commercial opportunities will be able to access the products and services implemented under the IBSS.

Relevant key actions include:

- The roll out of three Indigenous business hubs, which will be a one-stop-shop to access business advice and connect with existing mainstream and Indigenous business support services. Indigenous clients will receive a single point of contact to discuss their business needs, and be guided to the most appropriate service and advice.
- Tailored wrap-around support for Indigenous microbusinesses in remote areas is being expanded - with microenterprise development and community economic development programs being delivered by Many Rivers Microfinance Ltd.
- Increased funding for grant, loan and lease packages for Indigenous start-ups in remote areas of the Northern Territory including remote native title areas, Aboriginal Land Rights Act areas, and Community Living Areas is available through IBA.

In addition to the IBSS deliverables, the Government has established a \$90 million Indigenous Entrepreneurs Fund (IEF) which can be accessed by Indigenous art centres located in regional and remote Australia. IEF funding is available for business plant and equipment. These are one-off grants for capacity-building plant and equipment, where finance is not available or additional support is required to attract finance.

A Business Advisory service is also available under the IEF that can provide targeted assistance for start-up and expanding Indigenous businesses, where this service is not available elsewhere.

Intellectual Property Rights – IP Australia

IP Australia is updating its publication *Nanga Mai Arung/Dream Shield: a guide to protecting IP for Aboriginal and Torres Strait Islander people*, which was designed to help Indigenous business owners understand IP issues. The update will include new guidance and relevant case studies.

Trade marks

The registration and use of trade marks is an option available to Indigenous communities and businesses who wish to indicate the commercial source of art, crafts, souvenirs or any other merchandise. Standard trade marks for business brands and product names can distinguish a trader's goods in the market against those of other traders and alert consumers to products and services that originate from a particular Indigenous business.

The trade mark system also provides for certification trade marks (CTMs) which perform a different function to standard trade marks. While standard trade marks indicate the commercial source of origin to a consumer, CTMs indicate that goods have been 'certified' as meeting a particular standard or having a particular composition, mode of manufacture, or some other characteristic. CTM examples include the 'Woolmark' and 'Australian Made' logos. CTMs and standard trade marks are often used in conjunction with each other. For example, a garment might have the fashion brand's standard trade mark logo and the 'Woolmark' logo CTM next to each other.

A CTM scheme would not prohibit inauthentic Indigenous 'style' products from being sold in Australia, but it would provide a mechanism to promote authentic products over inauthentic products and increase consumer understanding of authenticity.

A CTM may be used, typically, with the payment of a licensing fee to the CTM owner for products that meet the published rules as determined by the CTM owner under the certification scheme. The rules for CTMs must be approved by the ACCC to ensure they do not mislead consumers or raise competition issues in Australia.

CTMs are private rights which can be owned and administered by an organisation or other entity. The owner is responsible for registering and maintaining the CTM, licensing others to use it, enforcing it against infringement by traders that are not licensed to use it and ensuring that licensees use it in accordance with the rules. Establishing value in a CTM scheme would rely on appropriate governance arrangements and marketing efforts, and the sufficient participation of producers.

A previous CTM scheme for authentic Indigenous products was attempted from 1998-2002 but was not effective due in part to the complexity associated with the criteria and difficulties in applying a national scheme to considerable regional diversity. Any new CTM scheme should take into account the lessons learned from this scheme.